United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-1633

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

To be argued by
Thomas A. Butler

IN RE

PENN CENTRAL COMMERCIAL PAPER LITIGATION

ALEX SHULMAN, Plaintiff,

-against-

GOLDMAN, SACHS & CO., et al. Defendants.

SEATTLE-FIRST NATIONAL BANK, Applicant.

B

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REPLY BRIEF

This reply brief is submitted on behalf of Seattle-First National Bank ("Seattle") in further support of its appeal and in reply to the briefs of Goldman, Sachs & Co. ("Goldman, Sachs") and Alex Shulman ("Shulman").

POINT I

SEATTLE IS ENTITLED TO INTERVENE AS OF RIGHT

A. Seattle has an interest in Shulman I.

Appellees argue that Seattle does not have an interest in the transaction which is the subject of Shulman I because allegedly Seattle has not stated a claim for relief and cannot maintain an independent action against Goldman, Sachs until Seattle is found liable in Shulman II. This is not true. An independent cause of action is not a prerequisite to intervention. See Brief for Appellant, pp. 8-10; Trbovich v. United Mineworkers, 404 U.S. 528 (1972). Moreover, Seattle has stated an independent cause of action.

The law recognizes that a person has a legally protectable interest even if his right to monetary damages is contingent upon a judgment in another action. For instance, Rule 14 of the Federal Rules of Civil Procedure provides that a defendant, as third-party plaintiff, may sue a person, not a party to the action, who may be liable to the third-party plaintiff. Seattle has impleaded Goldman, Sachs in Shulman II and requires intervention here to protect its impleader action.

In addition, Seattle's proposed intervention

complaint, in fact, states an independent cause of action for declaratory judgment that Goldman, Sachs is liable to Seattle for any judgment in favor of Shulman in Shulman II. A declaratory judgment is not barred because the claim for relief is contingent. Lumbermens Mutual Casualty Company v. Borden Company, Inc., 241 F. Supp. 683 (S.D.N.Y. 1965); Wright & Miller, Federal Practice & Procedure (1973), Civil § 2757, at 759. In Lumbermens, Judge Tenney concluded:

> "The fact that plaintiff does not presently have a cause of action against these defendants until it pays its insured is not determinative. The whole reason for the enactment of the statute was to declare the rights of parties and grant further and proper relief, though in a strict sense no cause of action had accrued." 241 F. Supp., at 698.

Seattle's proposed intervention complaint also states an independent claim for restitution. Restatement (Second) of Agency § 373 (1957), at 161-162, states:

> "A person to whom an agent delivers money or goods belonging to his principal, or on account of his principal, is subject to liability to the agent for their retention if such person is thereby unjustly enriched at the expense of the agent."

Seattle, as agent, is entitled to maintain an independent action to recover monies which it paid out for its principal and which unjustly have enriched Goldman, Sachs so that Seattle will not have to bear the loss of this transaction. Mott v. Tri-Continental Financial Corporation, 330 F. 2d 468 (2nd Cir. 1964), relied on by Goldman, Sachs, is inapposite. That case did not involve the rights of an agent. Goldman, Sachs, without citation, states that Seattle did not act as an agent. Such a conclusion is not supported by the proceedings below. Moreover, the question as to whether Seattle is agent is to be decided at trial.

Shulman argues that Seattle's proposed complaint is insufficient because it requests money damages. Seattle as agent is entitled to money damages. However, even if Seattle were not entitled to money damages, its intervention complaint is sufficient to demonstrate it is entitled to the relief discussed above. A complaint is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant regardless of the relief requested. Dotchay v. National Mutual Insurance Company, 246 F. 2d 221, 223 (5th Cir. 1957).

Seattle's proposed intervention complaint demonstrates that it is entitled to relief.

The cases relied upon by appellees and the district court are not controlling here. Moreover, these cases are inapplicable on their facts to Seattle's proposed intervention. In Solien v. Misc. Drivers and Helpers Union, Local 610, 440 F. 2d 124, 132 (8th Cir. 1971) cert. denied, 403 U.S. 905 (1971), a union member as complainant attempted to intervene in a NLRB proceeding. In Kheel v. American Steamship Owners Mut. Pro. & Indem. Ass'n., 45 F.R.D. 281 (S.D.N.Y. 1973), intervention was sought by holders of unproved claims in an action brought by trustees in bankruptcy. In Air Lines Stewards, etc. v. American Airlines, Inc., 455 F. 2d 101 (7th Cir. 1972), the Equal Employment Opportunity Commission sought to intervene in actions brought by a union and others charging violations of Title VII of the Civil Rights Act of 1964. In Donson Stores v. American Bakeries Company, 58 F.R.D. 485 (S.D.N.Y. 1973) the proposed intervenors were consumers who sought to intervene in an anti-trust action brought by retailers against baking companies to assert a claim

under section 4 of the Clayton Act.

In United States v. 936.71 Acres of Land, State of Fla., 418 F. 2d 551 (5th Cir. 1969), the proposed intervenor attempted to intervene in a dispute over condemnation rights. The Court concluded that the proposed intervenor had no right in the land or the condemnation award, and that the interest asserted was "nothing more than the chance to buy the proceeds of Tract 3913 from the state, once the state's title was secured." 418 F. 2d at 556.

In Solien, Kheel, Air Lines Stewards, and Donson, the decisions to deny intervention were based on a balancing of the interests of the proposed intervenors against the provisions and policies of specific federal statutes. No such federal statutes are involved in this case. In 936.71 Acres of Land, supra, the Court reached its decision because the contingent interest involved was so remote that it did not require protection. In the present case Seattle's interest even if contingent requires immediate protection.

In addition, none of the cases cited by appellees or the court involve as does this case an interest which can be asserted as an independent cause

of action and which is entitled to protection through declaratory third-party actions. Finally, the cases cited by the court were decided prior to Trbovich, supra. Any general language in them stating that a proposed intervenor must state an independent cause of action is not in accord with Trbovich, and must be re-evaluated in light of the Supreme Court's decision.

B. The disposition of Shulman I may impair Seattle's interests.

Appellees, like the district court, argue that Seattle must demonstrate with certainty that its interests will be impaired. This argument ignores the plain language of the rule. Rule 24 (a) (2) only requires that Seattle's interests may as a practical matter be impaired. The factual and legal identity of Shulman I and Shulman II make it likely that any decision in Shulman I will be followed in Shulman II. Thus stare decisis provides the possibility of practical impairment required by Rule 24 (a) (2).

POINT II

THE COURT ABUSED ITS DISCRETION IN DENYING PERMISSIVE INTERVENTION

Appellees, like the district court, ignore the plain language of Rule 24 (b) (2) that where a proposed intervenor raises common questions of law or fact, intervention should be allowed unless there is a showing of undue delay or prejudice. This Court has stated that intervention satisfies "the great public interest ...of having a disposition at a single time of as much of the controversy as is fairly consistent with due process." Ionian Shipping Company v. British Law Insurance Co., 426 F. 2d 186, 191 (2nd Cir. 1970). There is nothing in the record, the district court's opinion or appellees' briefs which shows that intervention would unduly delay or prejudice the original parties or would be inconsistent with due process.

Appellees, like the district court, only point to the incident delay that can be handled easily through the court's discretionary power to subject the parties "to conditions necessary to the 'efficient conduct of the proceedings.'" 426 F. 2d at 192, In Lipsett v. United States, 359 F. 2d 956, 959 (2nd Cir.

1966), relied on by the appellees, the court denied intervention not because of any inherent delay or prejudice, but rather because it found that legal issues added by the intervention would create "a lively probability of trial confusion."

POINT III

THE COURT ABUSED ITS DISCRETION IN DENYING CONSOLIDATION

The district court abused its discretion in denying consolidation because it held that Shulman II was not pending before it as required by Rule 42 (a), even though Shulman II was pending before it pursuant to 28 USC § 1407 for all pretrial proceedings including motions for consolidation. Consolidating Shulman I and Shulman II will not frustrate the venue provisions of the National Bank Act as appellees allege because the venue provisions may be waived by Seattle. Michigan Nat. Bank v. Robertson, 372 U.S. 591, 594 (1963). Moreover, no change of venue is necessary in this case because both Shulman I and Shulman II are pending before the same court.

This court is reviewing the clearly appealable order denying intervention. Because intervention and consolidation involve the same considerations and because the district court's order denying consolidation was an abuse of discretion, this Court should exercise pendent jurisdiction to review the order denying consolidation. General Motors Corporation v. City of New York, 501 F. 2d 639, 649 (2nd Cir. 1974). The consolidation issue

was raised in our notice of appeal and should be heard even though it was not mentioned in the pre-argument statement or in the letter of designation. Shulman does not suggest any way in which he would be prejudiced if the appeal were heard and Goldman, Sachs does not even question the appealability of the consolidation issue.

CONCLUSION

The substantially identical claims and defenses of Shulman, Seattle and Goldman, Sachs, as well as the common transaction underlying Shulman I and II, make intervention or consolidation appropriate to prevent impairment of Seattle's claim in Shulman II and its reputation. No sufficient reason for denying intervention was given by the district court. The reason given for denying consolidation was based upon an erroneous view of the district court's power. The district court's denial of Seattle's motion promotes just the sort of "fragmented approach that the revitalized federal rules seek to avoid". Nuesse v. Camp, 385 F. 2d 694, 702 (D. C. Cir. 1967)

WHEREFORE, FOR THE REASONS STATED ABOVE AND IN THIS BRIEF, APPELLANT RESPECTFULLY REQUESTS THAT THIS COURT REVERSE THE DECISION OF THE DISTRICT COURT AND REMAND THIS CASE TO THAT COURT WITH INSTRUCTIONS TO

ORDER THAT SHULMAN I AND II BE CONSOLIDATED OR THAT APPELLANT BE PERMITTED TO INTERVENE IN SHULMAN I.

Respectfully submitted,

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FRANCIS LUK, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 200 Park Avenue, New York, New York 10017. That on the 11th day of February, 1975, deponent served the within Reply Brief upon the attorneys on the attached list by depositing true copies of same enclosed in a posted properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Francis Luk
FRANCIS LUK

Sworn to before me this
11th day of February, 1975

Edward F. Boore

Qualified in Westchester County
Certificate filed in New York County
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